attributable to the leg injury and $7,000 to the loss of the kidney.

This leaves the question of loss of future earnings still to be determined and I find this a difficult matter to assess.

At the date of the accident the plaintiff was drawing $161 as a Lance Corporal which included pay and allowances. His evidence was that he had signed on for a period of 10 years of which he had served 4 at the time of the accident.

According to Major Stewart his Commanding Officer the plaintiff had prospects of promotion in due course of time, first to Corporal and then to Sergeant. The plaintiff's army career is now closed to him but according to his evidence he had no intention of continuing on after the completion of his 10 year period of service. His intention was to try and obtain employment with the Telephone Board in view of the experience gained while in the Army.

The plaintiff's present position is that he is unemployed. He has made two unsuccessful attempts to obtain employment one as a storekeeper and the other as a bus conductor with the Singapore Traction Coy.

While the plaintiff's general experience would appear to be somewhat limited there is no reason why he should not be able to lead a perfectly normal existence and although no doubt employment difficulties do exist at the present time he should if he perseveres obtain satisfactory employment if he will but put his mind to it and set about it with a will.

The termination of the present litigation should go a long way towards restoring a brighter and more normal outlook.

It is true he may for some time have to be content with earning less than he was getting but there is no reason to suppose that he will not eventually approximate to or even exceed it.

Giving the best consideration I can to the problem I am of opinion that an award of $2,500 would in the circumstances be justified.

In the result therefore I assess the general damages to which, in my view, the plaintiff is entitled at $16,000 which together with the agreed special damages of $200 makes a total of $16,200.

There must be judgment, therefore, for the plaintiff against the 3rd and 4th defendants for the sum of $16,200 and costs.

Judgment for the plaintiff.

Solicitors : *Donaldson & Burkinshaw; Oehlers & Choa.*

In re S. A. A. ALSAGOFF, DECD.; SYED ZAKARIA ALSAGOFF & ORS. v. R. D. STEWART & ORS.

[O.C.J. (Whyatt C.J.) May 2, 1958]

[Singapore — Suit No. 1027 of 1956]

Wills and Trusts — One will annexed to and forming part of the other — Principles of construction — To be read together to discover testator's intention — Former construction entirely based on unilateral consideration of one will — Other will not produced before nor considered by Court — Effect of former adjudication.

Practice and Procedure — Judgment — Setting aside — Jurisdiction of Court to set aside earlier judgment adversely affecting parties.

Syed Ahmad bin Abdulrahman Alsagoff died on March 27, 1875 leaving two testamentary dispositions, an English will dated December 30, 1868 and an Arabic will dated December 20, 1868, which was annexed to and formed part of the English will; both the wills were admitted to probate. In the events that have happened, the residuary estate is distributable in 1961. In 1918, Woodward J. on a construction of both the wills read together, decided in *Syed Ali bin Mohamed Alsagoff v. Syed Omar bin Mohamed Alsagoff*(1) "the residue of the income from the landed property after certain payments enumerated in the will, is to be distributed every year among those who are entitled to it according to Mohamedan law, the share of every male to be twice as much as the share of every female, of his (the testator's) lineage", the intention being that "descendants" should include "the remotest generation coming into being during the prescribed period and that on the death of the parent each succeeding generation should take, *per stirpes*, a life interest in the income till the time of distribution."

On the death of Shariffa Bahia, a life-tenant, who left 2 daughters, Shariffa Shekka and Sheriffa Aisha and seven grandchildren, being the children of her predeceased son Syed Ahmad, an Originating Summons was taken out in 1941 by the then trustees of the testator's will for the construction of the English will. No reference was made to the Arabic will. It was held by McElwaine C.J., on the construction of the English will, that the income was divisible among the 2 daughters and the grandchildren in equal shares. Some of the grandchildren were then infants. The present proceedings were commenced in 1956 by three of them (who were still infants) to set aside the order on the ground of various irregularities and, in particular, it was contended that the judgment pronounced in 1942 was given *per incuriam* because the Arabic will, which was highly relevant, was not produced before nor considered by the learned Chief Justice. They contended that, as a matter of pure construction and the cumulative effect of both the wills, the grandchildren, among themselves, were entitled to one-half and the children of the two daughters (who had died in the meantime) to one-quarter share each of the income formerly paid to Shariffa Bahia.

Held: on a proper construction of the two wills, it made no difference to the distribution of the income

passing on Shariffa Bahia's death that the son predeceased her; the children of Shariffa Shekka and Shariffa Aisha still get one-quarter each and the remaining half, which would have been payable to the son, if he had lived, goes to his children.

Counsel for the children of the daughters, whose interests are opposed to those of the plaintiffs, having conceded that if the Arabic will was not in fact before the Court in the earlier proceedings that, by itself, would be sufficient ground for setting aside the judgment if the Arabic will was at all relevant to the point,

Held: the Arabic will, which was not before the Court, was highly relevant and the former judgment should be set aside.

[Editorial Note: for a full discussion on this case see *SK.D.'s* article "Alsagoff Case" published at p. lxvii *supra.*]

Case referred to:—

(1) *Syed Ali bin Mohamed Alsagoff v. Syed Omar bin Mohamed Alsagoff* (1918), 15 S.S.L.R. 103.

CIVIL SUIT.

N. A. Mallal for the plaintiffs.

C. H. Smith for the 1st, 2nd and 5th defendants (trustees).

K. Gould for the 3rd and 4th defendants.

Cur. Adv. Vult.

Whyatt C.J.: — On the 5th December 1941, the trustees of the Estate of Syed Ahmad bin Abdulrahman Alsagoff took out an originating summons for the purpose of obtaining a decision of the Court on a point of construction which had arisen under Syed Ahmad bin Abdulrahman's will. When the summons was issued, hostilities had not broken out but by the time it was heard on the 5th February, 1942, the city of Singapore was under heavy bombardment and in consequence the case was heard in the Chief Justice's Chambers which by agreement were treated as an open Court. The Chief Justice reserved his decision but delivered a written judgment a week later, on the 12th February, 1942, in which he held that the two daughters and the children of a predeceased son of Shariffa Bahia, a grand-daughter of the testator, were entitled to the income of the estate which had passed on the death of Shariffa Bahia on the 28th May, 1941, in the proportion of one third to each of the daughters and the remaining third to the children of the deceased son. The only persons present when judgment was delivered were the Chief Justice and one counsel, the other counsel no doubt being otherwise occupied in the hostilities which were then nearing their climax.

After the termination of hostilities, the trustees distributed the income in accordance with the judgment of the 12th February 1942 until 1956 when three of the children of the deceased son, through their next friend for they were still minors, raised objections to the judgment. The grounds on which they objected were, first, that the necessary documents and authorities had not been placed before the Chief Justice at the hearing on the 5th February 1942 and secondly, that if the case had been fully presented to the Chief Justice, his decision would have been different and he would have ordered that a half, instead of a third, of the income should be distributed to the children of the deceased son and a quarter should be distributed to each of the two daughters. A re-allocation of income on this basis would involve a large sum but its importance lies in the fact that in 1961, the capital of the estate will be distributed to the income beneficiaries on the same basis as the income is being distributed and as the capital value of this estate is in the region of 20,000,000 dollars, the differences in the amount of capital which the children of the deceased son will receive if the income is re-allocated as they claim it should be, will be significant.

The three children of the deceased son who by their next friend raised objections to the judgment of the Chief Justice, eventually, commenced the present action against the trustees and against a child of each of the two daughters of Shariffa Bahia, (both daughters having died since the judgment), claiming that the judgment should be set aside and that one half of the income formerly paid to Shariffa Bahia should be paid to the children of her deceased son, and that one quarter should be paid to the children of each of her two daughters.

I am, therefore, called upon to decide two questions in these proceedings: first, whether the judgment of the 12th February 1942 should be set aside and secondly, whether the income formerly paid to Shariffa Bahia should be shared among her issue in the proportions claimed by the plaintiffs. Logically, as was pointed out in argument, I should first decide the question whether the judgment should be set aside before considering the question of the distribution of the income but on the other hand, if I am of the opinion that the distribution ordered by the judgment of the 12th February 1942 is correct, it would be quite academic to consider whether it should be set aside. I proceed, therefore, to consider, in the first place, whether the income should be distributed in the proportions claimed by the plaintiffs.

The relevant provisions governing this matter are to be found in two testamentary dispositions; an English will dated the 30th December 1868, and an Arabic will dated the 20th December 1868 which is annexed to and forms part of the English will. The English will states that the income from the testator's freehold and leasehold property is to be divided annually amongst the testator's wife and children and their descendants according to the shares prescribed by Mohammedan law, and by way of emphasis, the testator repeats, in a later passage in the will, that it is his wish and intention that his freehold and leasehold property should descend to future generations according to the rules of Mohammedan law. The Arabic will expresses a similar intention. It states that the final balance of the income from the testator's lands and houses is to be distributed annually among his widow and children according to Islamic law, that is to say, the share of every male to be twice the share of a female, and that after the death of a child, the share payable to the child is to be payable to the children of the child, and so on from generation to generation but that if a descendant dies without children, then his or her share is to devolve upon other descendants of the same degree.

It appears to me clear, reading those two passages of the English will and the Arabic will together, that it was the testator's intention that the income from his immoveable property should be distributed not only amongst his children, but after their death, amongst his grand-children, and after their death amongst his great-grand children, and after their death, amongst his great-great grand-children, and so on until the time came to distribute the capital. The only qualifications he introduces are that children are only to take their parent's share — in legal parlance they are to take *per stirpes* — and a male's share is to be twice that of a female. The very same point on the very same English and Arabic wills was considered by the Court of Appeal as long ago as 1918 in the case of *Syed Ali bin Mohamed Alsagoff v. Syed Omar bin Mohamed Alsagoff*[1] and was dealt with by Woodward J. in these words. "I think there can be no doubt," he said, "that the intention was that "descendants" should include the remotest generation coming into being during the prescribed period, and that on the death of the parent each succeeding generation should take, *per stirpes*, a life interest in the income till the time of distribution." Mr. Justice Woodward felt no doubt that that was the correct construction and if I may say so with respect, neither do I.

This being the construction to be placed on the English and Arabic wills, the next question to be determined is the proportions in which the various beneficiaries are to share. The answer to this question is, in my opinion, to be found in the words of the Arabic will which reads as follows: "the final balance of income is to be distributed among those entitled to same according to Islamic law, that is to say, the share of each male being twice the share of each female." Thus if *A*, *B* and *C* are entitled to "the same", that is to say, if they are beneficiaries entitled to the final balance of the income, then the income is to be distributed among them in such a way that the share of a male is twice that of a female. Hence if *A* and *B* are females and *C* is a male, *A* and *B* each get one quarter of the income and *C* gets the remaining half of the income. When *A* dies, her quarter share goes to her children for two reasons, first because the Arabic will says in terms that after the death of a child the share payable to such child shall go to the children of such child, and secondly, because the English will stipulates that the income is to be divided amongst the testator's descendants. The distribution amongst *A's* children must, of course, be carried out in such a manner that the share of a male is twice that of a female, and therefore if *A* leaves two daughters, *X* and *Y*, and one son, Z, the daughters will each get one quarter of the income which their mother used to receive, and the son will get the remaining half. Consequently if, Shariffa Bahia, in the present case had left two daughters and one son all living, it is, in my opinion, clear beyond doubt that the daughters would each have been entitled to one quarter and the son to one half of the income formerly paid to Shariffa Bahia.

What difference does it make that the son died before Shariffa Bahia? If he died leaving children, as he did in this case, in my view the words of the Arabic will apply, namely, "after the death of a child, the share payable to such child shall go to such child's issue, both male and female". If it be said that these words only apply when a share of income has already become payable to a child and not when it is contingently payable on the child surviving his parent, the answer, in my opinion, is that such a construction would exclude from participation in the income children of a child who had predeceased his

parent and thus would conflict with the English will which provides that the descendants of the testator are to share in the income of the estate. Therefore, it follows, in my opinion, that it makes no difference to the distribution of the income passing on Shariffa Bahia's death that the son predeceased Shariffa; the daughters of Shariffa Bahia still get one quarter each, and the remaining half, which would have been payable to the son if he had lived, goes to his children.

I reach this conclusion as a matter of pure construction of the wording of the two wills, reading the two instruments together as one testamentary disposition. I should add that, according to the contention of counsel for the plaintiffs, the same result would be achieved if the wills were interpreted by applying, by analogy, the Muslim law of Wakaf, but having reached a clear conclusion as to the testator's intention by reading the two wills together and construing them in the manner I have indicated, it is not necessary for me to express any opinion on this aspect of the plaintiffs' argument.

This being, in my opinion, the correct interpretation of the wills, how did it come about that the Chief Justice in his judgment of the 5th February 1942, held that Shariffa Bahia's daughters were to get one third each, and the deceased son's children one third. This result is all the more surprising in view of the fact that the affidavit filed by the trustees in support of the originating summons concluded by stating: "If the latter is the case, (that is, if the descendants of the testator living at the date of Shariffa Bahia's death are to share in the income), the heirs of Shariffa Bahia would be entitled as follows: The successors of Syed Ahmad bin Sagoff Alsagoff (the deceased son) one half and Shariffa Shekha and Shariffa Aisha (daughters) one quarter each." And yet, notwithstanding that the Chief Justice held that the descendants of the testator living at Shariffa Bahia's death were entitled to share in the income, he ordered the distribution to be on the basis of one third to each daughter and one third to the children of the deceased son. It is not easy after this length of time to ascertain how this came about but it would appear from the brief notes taken by the Chief Justice during the case that at one stage counsel for the daughters of Shariffa Bahia introduced the argument that division of the income according to Mohammedan law meant, in this context, division according to the Mohammedan law of inheritance; that is to say, the income should be divided as if it had formed part of Shariffa Bahia's estate and she had died intestate. No one seems to have challenged the argument, possibly because the main purpose of the originating summons was to ascertain who were comprised in the class of "descendants", not how the income was to be distributed among such descendants once ascertained. Counsel for the plaintiffs in these proceedings has criticised the conduct of the counsel who appeared for the children of the deceased son in these earlier proceedings, not only because he did not challenge this argument but because, according to the Judge's notes, he told the Court that he agreed with the counsel who advanced it. In fairness, however, to the counsel who has thus been criticised and who has not had an opportunity of explaining what occurred, if indeed he can remember after so many years, it should be pointed out that the Judge's note reads, "Paragraph 11 of affidavit. Agrees with Johannes." Paragraph 11 of the affidavit deals only with the question as to who are comprised in the class of descendants and is not concerned with the argument on the Mohammedan law of inheritance and therefore it may be that counsel was merely agreeing with the submission which had just been made regarding the class of descendants. This view is reinforced by the fact that this remark of counsel followed, as the notes show, immediately after an argument had been addressed to the Court on the question of ascertaining the class of descendants. I am not satisfied, therefore, that there was any express assent by counsel for the children of the deceased son to the argument that the distribution should be in accordance with the Mohammedan law of inheritance. The very unusual conditions in which the hearing took place may well explain why neither counsel nor the Court questioned the argument and in the circumstances it may be the Court's decision on this point should be regarded as having been given *per incuriam*.

The argument on the Mohammedan law of inheritance has been repeated in these proceedings and after a much more detailed consideration than was possible in the 1942 proceedings, it is, in my opinion, quite clear that it does not apply to the distribution of the income formerly received by Shariffa Bahia. It will be sufficient to refer to one possible aspect of its application which makes this plain. If, for the sake of argument, Shariffa Bahia's son had died leaving, not sons and daughters, but only daughters, then

according to the Mohammedan law of inheritance, Shariffa Bahia's two daughters would inherit and her grand-daughters would get nothing. But the testator has stated in emphatic terms, both in the English will and in the Arabic will, that the income is to be distributed among all his descendants and therefore, the grand-children cannot be excluded from a share in the income. It follows that it cannot have been the testator's intention that the Mohammedan law of inheritance should apply to the distribution of this income.

Having now dealt with the second of the two questions raised in this action and reached the conclusion that the judgment given in 1942, in so far as it deals with the proportions in which the income is to be shared, was erroneous, the next question is, can it be set aside? Counsel for the plaintiffs advanced several arguments in support of the view that the judgment can and should be set aside and, in particular, he maintained that only the English will and not the Arabic will was before the Court, and that this fact alone entitled the plaintiffs to have the judgment set aside. Counsel for the third and fourth defendants, (that is, the children of Shariffa Bahia's daughters) whose interests are opposed to those of the plaintiffs in this matter conceded that if the Arabic will was not in fact before the Court, that would be sufficient ground for setting aside the judgment, assuming, of course, the Arabic will was relevant to the point which the Court had to decide in the 1942 proceedings. I proceed, therefore, to consider the submission of counsel for the plaintiffs that the Arabic will was not before the Court in those proceedings.

The original file has been produced from the archives of the Registry for my inspection. It does not contain the Arabic will. Unless the file has been interfered with since proceedings were concluded, the conclusion is inescapable that the Court did not have the Arabic will before it when it reached its decision in that case. It was suggested by counsel for the trustees that perhaps the file had been interfered with as the copy of the English will which appears in the file was not found in a position immediately after the affidavit to which it was exhibited but in a position next to the Judge's notes. Counsel for the plaintiffs pointed out, however, that an exhibit to an affidavit is not, as a rule, left by the solicitors with the Registry to be filed along with the affidavit; he usually takes the exhibit away and hands it up or a copy of it, to the Judge at the hearing. He suggested that this was what happened in the present case and hence the copy of the English will is located, if I may use the expression, next to the Judge's notes. In my opinion this is the correct explanation of the position of the copy of the English will in the file. Yet another suggestion put forward by counsel for the trustees as indicating that the file might have been interfered with was that a document described as a family tree exhibited to the trustees affidavit is not in the file. There again the exhibit would not, in the ordinary way, be located next to the affidavit; it would only appear in the file if it had been handed up to the Judge at the hearing. There is, however, nothing in the Judge's notes or in the judgment itself to show that there was any reference to a family tree or indeed any need to refer to a family tree, and the conclusion I draw is that this exhibit was never handed up at all. Perhaps the strongest argument in support of the view that the Arabic will was before the Court is that the English will itself refers, in an early passage, to "a paper writing in the Arabic language which is hereunto annexed" and which the testator directs "to be.....read as part of this my will." It may be said that this would have put the Court on enquiry and that if the Arabic will had not been forthcoming, the Court would have required its production. To this argument there are, I think, two answers; first, the reference to the Arabic writing occurs in a context dealing with personality and it might well have been thought, therefore, that it had no bearing on the points then being considered by the Court which were concerned only with immoveables; and secondly, the conditions in which the hearing took place were such as to render it unlikely that the production of further documents would be called for unless it was clear they were essential for the purpose of disposing of the case. The point, which, in my view, is of great significance in considering this matter is that there is no reference of any kind, either in the Judge's notes or in the judgment, to the Arabic will. On the contrary, the references are entirely confined to the English will and it is, in my opinion, in the highest degree improbable that this would be so if in fact the Arabic will as well as the English will had been before the Court. It is only necessary to glance at the report of the case of *Syed Ali v. Syed Omar*[1] where the Court dealt with this same estate to realise that when both the English and the Arabic wills are

before the Court, as they were in that case, it is inevitable there should be not one, but several, references to the Arabic will as well as to the English will in a judgment dealing with a point of construction. I reach the conclusion, therefore, that the Arabic will was not before the Court in the proceedings which took place in February 1942.

The only remaining question to be decided is whether it was relevant for the Arabic will to be before the Court in the 1942 proceedings. This can be dealt with very shortly. In the case of *Syed Ali v. Syed Omar, supra,* Woodward J. said: ".....the first question which arises is one of construction. What is the meaning of the words the testator has used? Besides the English will there was also a will in Arabic executed a few days earlier, and admitted to probate with the English will. Both wills must be read together to discover the testator's intention." So also the question raised in the 1942 proceedings was one of construction, and therefore both wills should have been read together to discover the testator's intention.

Accordingly, I am of the opinion that the judgment of the 12th February, 1942 should be set aside and that one half of the share of the income of this estate formerly paid to Shariffa Bahia should be distributed to the children of her deceased son, and one quarter to the children of each of her deceased daughters. Consequential upon this judgment it will be necessary to adjust the accounts for some years back but counsel for the plaintiffs stated that his clients will be content if the adjustment begins with the accounts of the 24th December, 1946 and I therefore make an order limiting the adjustment in the manner proposed by the plaintiffs.

Order accordingly.

Solicitors: *Mallal & Namazie; Donaldson & Burkinshaw; Rodyk & Davidson.*

CHINESE TIN MINES REHABILITATION LOANS BOARD v. CHEE HOI VOON

[O.C.J. (Syed Sheh Barakbah J.) August 8, 1958]

[Ipoh — Civil Suit No. 239 of 1957]

Practice and Procedure — Judgment — Former judgment unsatisfied — Second action on the same cause of action — Res judicata — Distinction between judgment de bonis propriis and de bonis testatoris.

Judgment having been obtained against an administrator of an estate *de bonis propriis* on a loan made to him in his representative capacity, a second action does not lie against him in his personal capacity for the balance due on the unsatisfied judgment or on the former cause of action. The previous judgment is still outstanding and the proper remedy is to execute the judgment.

[Editorial Note: See also *Farhall v. Farhall* (1871), 7 Ch.App. 123.]

Case referred to:—

(1) *Savena Supramaniam Pillay v. Tan Kah Chiat administrator of Tan Kong Liang decd.,* (1934) M.L.J. 133.

ACTION for balance due on unsatisfied Judgment.

S. B. Coates for the plaintiff.

F. C. Arulanandom for the defendant.

Cur. Adv. Vult.

Syed Sheh Barakbah J.: — This is an action by the plaintiff against the defendant claiming $22,467.35, interest and costs.

The defendant is the son and Administrator of the Estate of Chee Piang Thong. The estate consisted of a tin mine bearing the name of Liang Toong Kongsi. In 1948 the plaintiff made advances to the defendant in his capacity as Administrator of the said Estate, totalling $56,650, for the purpose of rehabilitating the said Kongsi, and as security therefor the defendant, as Administrator, executed a Bill of Sale in favour of the plaintiff over the mining engine and equipment at the said mine. The defendant failed to make adequate repayments of the loan balance to the plaintiff and on 3rd July, 1954, judgment was entered against the defendant in Civil Suit No. 141 of 1954 for $28,594.71, interest and costs, together with an order for the sale of the mining engine and equipment mentioned in the said Bill of Sale. After the sale there still remained a substantial sum owing to the plaintiff, who notified the defendant that they intended to proceed to attach the defendant's personal property at Hoi Voon Kongsi, Tronoh. The defendant thereupon wrote to the plaintiff's solicitors on 27th June, 1956, offering to settle the loan balance outstanding by allowing the Straits Trading Co. Ltd., Kampar, to deduct 5% from all sales of tin-ore produced by the said Hoi Voon Kongsi and authorising the said company to pay such sums deducted to the plaintiff. The defendant in the said letter further gave an undertaking that he should be held personally responsible for the loan balance. Ex.P.3 is the